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HINDU CASTES

By

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THE subject of Hindu Castes may be treated under the following heads :—

(1) That caste, as an institution, formed on the basis of calling, belongs to the Vedic and Smriti periods, and was then limited only to four.

(2) That the present Hindu castes have gradually and largely developed in later times, and do not strictly represent their ancient basis of formation ; they may now be classed under the two original heads of *Dvijas*, that is, those habitually wearing, or entitled to wear the sacred thread ; and *non-Dvijas*, that is, those not wearing, as not being entitled to wear the sacred thread.

(3) That castes are, in the main, social groups ; and religious to a certain extent only.

(4) That the present castes have been formed by (*a*) immigration, (*b*) new settlements, (*c*) foreign settlers and aborigines being admitted to the Brahmanic fold.

(5) That sub-castes are chiefly the result of the three separating influences of (*a*) trade or calling, (*b*) food, (*c*) marriage.

(6) That the object of the formation of castes and sub-castes was to bring about social intercourse, and a co-operative spirit of harmony and mutual good will among individuals pursuing the same calling, bearing the same social status, and holding similar tendencies.

(7) That castes did not originally, nor in the mediæval and later periods of their extension, subsist on the basis of birth, but, of late, castes are very strict and exclusive as to the birth-basis. As communities, they were subject to rules, customs and laws many of which are no longer suited to their present state under altered conditions, nor necessary to their healthy existence.

(8) That such rules, customs and laws, though formulated, from time to time, in the best interests, social and communal, of the various castes, being gradually misunderstood and not followed, instead of yielding the advantages intended, have produced positive evils, neither contemplated nor foreseen, with the result, that caste, as an institution, has now become a bye-word of reproach.

(9) Suggested reforms, infant-marriages, widow-marriages, as performed by reformers are violations of sacramental contracts; castes should move with the spirit of the times, and not terrorize members, nor interfere with their individual liberty of action—either personally or professionally.

The Tribes, Races, and Castes of India have formed subjects of perennial interest to all interested in Indian Anthropological Research. To the student of Ethnology and Sociology, in particular, they have afforded a wide and tempting field; but, ever since the taking of periodical censuses, the statistical data collected, and now available in the Census Reports, have greatly widened their scope, and it is now possible to treat of Indian castes not locally or provincially, but as a whole, and with some degree of comprehensiveness. The allied subject of Indian Tribes and Races, though equally interesting, covers a much wider field and I will therefore leave it for another occasion.

Though the scope of this paper is thus narrowed to the one branch of "Indian Castes," the materials at our disposal admit of its treatment under various heads. The terms used to connote the social groups called castes, the various causes which have gone to determine the name of each separate caste, the origin and history of caste as an institution generally from the Vedic times, through the Epic, Renaissance, and dark periods of Indian history, down to the present day, are each of them subjects of great interest. We then pass on to castes as judged by appearance, their varieties of food and dress, special characteristics and idiosyncracies, traits of character and determining habits; their occupations ; details about their religion, superstitious beliefs, and prejudices ; their customs and communal arrangements ; their present condition and future prospects with suggestions for reform,—all these points cannot admit of full or proper treatment in the course of a single lecture. Judged by different standpoints, each of these heads of inquiry has an interest of its own. But on this occasion I propose to treat of the origin and socio-religious aspect of castes as a whole, and deal with the two customs of infant-marriage and enforced widowhood which have been much discussed of late, and have brought the upper castes into special prominence. I will then try to discuss certain suggested reforms ; and conclude by offering a few hints as to the direction in which all attempts at reform should be made by Committees acting as intermediaries between castes and courts.

Varna, Jati, and Dnyati.—As I mentioned above, वर्ण (meaning colour), जाति (meaning birth or race, from *jan*, to be born), and ज्ञाति or नात (meaning caste, from *dna*, to know, that is the distinctive peculiarity or feature by which each caste is *known*), are the three

terms still in promiscuous use to denote castes. Thus, we still hear in common parlance of Brahmans, Rajputs, Vaisyas and Sudras spoken of as the Ujali Varnas or white-complexioned classes, as distinguished from the Kali-paraj or dark-skinned tribes (aborigines). These two main divisions of the Indian people take us back to the two-fold Vedic divisions into Aryas and Dasyus, and it is remarkable that this distinctive nomenclature still obtains in spite of the lapse of ages. The *Ujali Varnas* are to this day the Aryan settlers in the plains (belonging to numerous sub-divisions and ramifications of the four original castes of Manu), who have introduced order and civilization; while the *Dasyus,* or thieving aborigines, dwelling in mountain fastnesses, and given to rapine and plunder, are the *Kali-paraj* tribes of Bhils, Kolis, Mehvasis, Todas, Kois, Santals, Dhondhias, Chodhras, Naikas, Gamtas, Varlis, Kathoris, Thakurs, Kothkaris, Ramosis, &c.

Játi or जात distinguishes the caste of an individual by his birth as distinguished from *Varna* which judges of him by colour or appearance. The division is, therefore, greatly narrowed, and the term ज्ञाति, though broader than जात, is much less comprehensive than वर्ण. The distinguishing characteristics or features which have determined and given names to different castes are local, occupational, and mythic. Thus the Bhárgav, Kapil and Kánva castes of Brahmans are mythic, and so called after the sages Bhrigu, Kapil, and Kánva ; *Audichs* are northerners, and *Deshasthas* are residents of the Desh or Deccan plateaus as distinguished from the Konkanasthas residing in the Konkan low-land ; Nágaras from Nagar or Vadnagar ; Unevàls from Unâ ; Modhs from Modherá ; Shrimáli, from Shrimál, or Bhinmali in Marwar ; the Trivedi and the Chaturvedi

Brahmans from their reading of the three Vedas and the four Vedas ; and the Sonis, Kansárás, Luhárs, Sutárs, Ghánchis and Mochis are instances of occupational type.

Caste, then, is an institution, in respect of which it is now possible to arrive at certain theories as to its origin. It is by no means peculiar to India only, but was and is widely prevalent elsewhere—at least, in its occupational form. The ancient Persians were divided into something like four castes ; and though it is not easy to say to what degree the exclusiveness of the four divisions, as regards intercommunion and marriage, was carried, yet it is certain, that, at this day, the priestly class is perfectly endogamous, in other words, marries only within itself. The Egyptians, also, to a certain extent observed caste, inasmuch as they had their classes of priests and warriors, agriculturists and shepherds, merchants and artisans. The Pharisees, who pretended to a higher dignity and held apart from other sects of the Jews, followed but a natural course, in the process of evolution, analogous to that of the Hindus ; and the feudal hostilities of the highland classes of Scotland, who, in course of time, became distinct ethnological groups, and of the patrician and the plebian classes in the Christian countries of Europe, manifesting various differences of physiognomy, colour, and physique, are but a repetition of the same tendency, only on a smaller scale. In its nature, however, caste is rather a branch of sociology than of religion ; and, so far from being eternal and changeless, is always subject to modification ; and this, we know on the authority of modern Indian research, has been the case through the whole range of Hindu myth and history. Students of Indian Vedic literature have now arrived at the conclusion that those

simple and pristine hymns, ringing with charming simplicity, and composed in the land of the five rivers (Panjab—the Brahmavarta between the Hindu Kush Valleys on the north and the Jhelum on the south) give no clear indication of any form of caste except that of the occupational or trade-guild type. The subsequent Epic literature of India—the Ramayana and the Mahabharata—tell the same tale; and passing through the successive stages of the Renaissance and the mediæval literature of India on the one hand, or the Epigraphic, that is, the lithic and plated records on the other, the student of Indian research is struck by the one cardinal fact, running all through, that the complicated system of caste, as now developed or even in its earlier stages, appears nowhere except in its occupational type—coppersmiths, goldsmiths, grain-dealers, oil-vendors are all recorded as having each their own *srenis* or guilds which speak more of occupations than of caste from the religious standpoint. The first trace of caste is found in Manu's Code; but even there one fails to see the present rigid caste rules as to food-connubium and intercourse. It may therefore be safely concluded that the primitive division of the Hindus into Brahmins, Kshatriyas, Vaishyas, and Sudras at one time was formed from their occupations, but at present does not denote definite Ethnological groups. Founded originally on occupation, their later divisions and sub-divisions, have been according to new settlements, language and manners, or due to war, invasion, or migratory habits of the people, and disputes about marriage, food and social rank, and generally influenced by religious, ethnic, geographic and other considerations, such as social and customary. Thus, when the social position of a person was determined not by birth alone, when the son of a

Bráhman was not a Bráhmàn, and each of the four primitive divisions of society was continually refreshed with the best blood of those who had the greatest aptitude for the work of the class he entered, qualified by a long apprenticeship or previous training, there was no isolation of one caste from another. It must have taken centuries before social rules grew so rigid as to sit like iron-shackles restraining all free and healthy movement and liberty of individual action, or the change from one class to another backwards or forwards, was felt or regarded as any social loss or gain in the sense it is regarded to-day. Interpreting in the language of political economy, the castes, then, simply represent a division of labour on a certain religious and social basis for mutual benefit and mutual convenience, or, to put in the facile words of an eminent scholar, "caste is merely a name for trade or occupation, and the sole tangible effect of the Brahminical theory is that it creates a religious sanction *for what is* really a primitive and natural distribution of classes."[1] As this division of labour is accompanied by various and many advantages, caste has not been and is not, as is the modern cant, an altogether unmixed evil. It has played an important rôle in the social economics of the community. It has preserved all the old natural elements of society in extraordinary completeness along with the institutions and ideas which are their appendages, and thus the Hindu nation at large, contrary to what has happened in ancient Greece and Rome ; it has helped to preserve, within the caste pre-

1 Sir H. S. Maine, Village Communities p. 57 ; Mr. Enthoven (Bombay Census 1901) [Vol. IX—Part I, pp. 174-5] calls Caste a puzzling "amorphous collection of anomalies and anachronisms"; experts like Messrs. Nesfield, Ibbetson and Risley describe Caste "as the largest group based on common occupation," and Tribe "as the largest group based on common descent" (Ditto).

cincts, the advance made or good achieved by that particular caste, and thus, if not promoted, at least safeguarded with a sentinel vigilance the degree of civilization already gained, or, "acted as obstinate conservator of traditional law"[1]; it has bound together men of the same class and exercised a check in certain directions on their moral conduct by one man's interests, ideas, and conclusions constantly correcting and regulating those of another; it has transmitted from father to son the inherited skill in certain indigenous arts, and thus constantly tended to improve them by the inherited effect of accumulated use in their remote descendants. It has saved the country from falling a victim to the great Moslem wave of proselytism; and it has above all, kept each man content with his own position in life. But this long list can be set off by an equally long list of evils. "In its working out, it has produced disunion and discord, and has made, especially, in the case of higher classes, manual labour contemptible; it has invited deterioration by confining marriages within very narrow circles; it has rooted conservatism in the country, and suppressed and restrained free opinion and the growth of individuality and independence of character; it has promoted early marriages, and, by making the individual's worth dependent upon the opinion of a small coterie of persons, increased false shame and made him desirous, even in instances where he has justly forfeited it, to regain it by caste-feasts, &c., and thus it has indirectly promoted matrimonial fees and Sraddha expenses; it has, by confining the privilege of mental and moral culture only to a limited class, denied those rights to the majority of the people, and thus starved the growth of a healthy national life,

[1] Sir H. S. Maine.

and the awakening of the national mind to the higher ideals and loftier conceptions of his existence." Thus each caste has been, as it were, a separate and stagnant centre of national life, isolated from the whole world; and what do we find at the root of all this mischief. It is the false theory of birth-right[2] which is accepted by the caste as well as by Courts above everything. If the whole Hindu community were with one mind to abolish birth-right and allow or force individuals to change from one class to another according to desire or special aptitude, all these disadvantages would instantly disappear. It is advanced in justification of castes as a generally accepted doctrine that party associations are necessary in a country to the existence of healthy political life, and that in places where caste has taken the place of these, the stability and vitality of communal interests are secured on the firmest political basis. But looking at the present aspect of the caste system it may justly be said that while there is nothing in the political associations that creates artificial barriers and false separations or engenders social divisions and breeds hatreds and antipathies, the caste in the name of religion is the very consecration of them all. One of the advantages of all free countries where this unnatural system is unknown, is that it enables a man lowest down in the social scale to rise to the highest position in the country for which he is fitted. But in caste-ridden India, a man

[2] Says Mr. Enthoven: "The connecting link between the different divisions of the Bráhmans, therefore, is that of a common social predominance, an hereditary distinction resembling the common birth-right of the temporal Peers of Great Britain, with the difference that, while the ranks of the Peerage are being constantly extended by the creation of new patents, *the limitation of Bráhman rights to those born of Bráhmans, is now, in theory at least, strictly enforced, in marked contrast to the practice recorded in the early law-books of India.*" (Bom. Cen. 1901 [Vol. IX—I], pp. 179-180).

has no ambition to rise at all, or is rather prohibited from cherishing it; while in the case of higher castes he is allowed the enjoyment of benefits appertaining to those ranks without being qualified for the same or suffers from inherent disabilities peculiar to those classes. For instance, Sanskrit scholars tell us from the internal evidence of the Shástras that there was a period in Indian history, when widow-marriages were common and child-marriages were unknown. The introduction of the latter custom is regarded as in some measure due to Mahomedan rule and oppression in India. Their oppression and influence led to the seclusion of Hindu women, and their unbridled licentiousness drove the Hindu father to seek a husband for his child-daughter that she may never be without some guardian in case of his death. With this seclusion at an early age came the loss of liberty and the dignity of mind; and constant dependence from father to husband occasioned that dwindling of faculties which distinguishes the Hindu woman of to-day from her sisters of the West. With this fall of position in the social scale, enforced widowhood would naturally become more common than it ever was before, and the Shástras were tortured or twisted all out of their meaning to suit these absurd notions. I have no quarrel with the noble sentiment which leads a person to consecrate his or her life to a life-long celibacy after the death of the partner. But it is so much out of the common run and so difficult for the lesser natures to follow, that it looks like a thing more to be admired than followed, when cherished by those who have risen superior to the carnal cravings of human nature. But thoughtless imitation of their betters by those lower in the social scale has been the ruin of poorer classes everywhere in the world, and Hindu Society is no exception

to the general rule. A life of celibacy, from being originally adopted by spiritually minded persons, came to be coveted by those persons who could only claim their superiority by birth, and not by merit, and afterwards to be blindly followed by others of the same class to the detriment of the entire community. Enforcement of the custom is but a step further, and it requires no very great stretch of imagination to realise how the custom must have soon crystallised into a religious commandment. In India nothing sticks to society so fast or so tenaciously as a precept bearing the impress, false or true, of religion ; and any one well acquainted with the Indian people can easily understand how some monstrous atrocities are complaisantly tolerated in India in the name of religion. Of the misery and wretchedness of the fate of Indian widows I need not here enter into details, patent as they are to the whole world. Words often tell their own tale, and the term "widow" recounts many a harrowing detail in the story of its evolution. The Indian word for a widow is "vidhavá," or *Ránd* (widowed) and to call any woman by the latter name is considered as a very gross abuse. This by itself shows the treatment of widows and their wretched and despicable condition, and how the very word has come to be regarded as a term of reproach and abuse. Even granting for argument's sake that the life-long celibacy of Indian widows in certain castes is enjoined by the Shástras, the very Shástras equally give us liberty to make new laws whenever it is expedient to do so. (Manu I, 108, 110, 118.)

But while the need for reform is felt and admitted by all, there is no unanimity as to the changes that are necessary or the mode of effecting them. The advanced reformers are for a radical change on the principles of natural justice, meaning that human nature being every-

where the same, the customs that are baneful and destructive of all social happiness, and which are not good for a certain class of people, could not be good for all Hindus ; others are for the reforms being based on the Shástras. The latter would undoubtedly be more acceptable to the majority of such Hindus as are averse to any radical and sudden change on the basis of natural justice. I will give one instance of this. The orthodox are opposed to widow re-marriage on the ground that the continence of the widow after her husband's death, is requisite for the performance of religious ceremonies and the carrying out of the husband's wishes in the matter of adoption, &c., when necessary. This involves a length of period and a singleness of purpose which could not be expected if her thoughts were allowed to wander marriage-wards. Again, it would induce the widow to avoid the fulfilment of her deceased husband's final injunctions in the matter of adoption, when there is no issue, and even to defraud the just rights of heirs, as she would naturally be tempted to do, if she had the liberty to join her lot with another man whose interest it would be to assert and extend her rights as against the members of her husband's family. Besides, there is a general belief among Hindus that a second marriage by a widow imperils her own as well as her husband's happiness in heaven. To secure this happiness is the object of the *Sávitri* holidays which are really Hindu women's holidays, and which are observed all over India by all classes of Hindus, thus showing the depth and intensity of religious conviction on the subject. Technical obstacles to a widow's re-marriage also arise from the Bráhmanical theory of marriage itself. It is the second of the four Sanskárs by which the different periods of human life are distinguished ; and with the

woman, the most indispensable, being the only one regenerating or expiatory ceremony allowed to her, its essential portion being the gift of the woman by her father to her husband, the effect of which act is to transfer her from her father's *Gotra* into that of her husband's. Thus the woman passed *in manum viri* (into the hand of her husband), who thenceforward became her absolute master or *patria potestas.* The bearing of this transfer on the question of her re-marriage is thus stated by an orthodox Hindu at pp. 276-77 of the Papers relating to Infant Marriage and Enforced Widowhood, published by the Government of India :—

" Her father being thus out of the question, it may be said that she may give herself in marriage. But this she cannot do, because she never had anything like disposal of herself. When young, she was given away ; so the ownership over her (if I may be permitted to use the phrase) vested then in the father, was transferred by a solemn religious act to the husband, and he being no more, there is no one to give her away ; and since Hindu marriage must take the form of a religious gift, her marriage becomes impossible."

Again, the orthodox assert that the prohibition of widow-re-marriage is but the carrying out fully and faithfully of a contract entered into at the time of marriage. It is a condition tacitly understood at the time that the step then taken shall be irrevocable for either of the parties, and shall affect the status and condition of one party (woman) at least life-long, not to mention the influence which every Hindu, as said above, supposes it to exercise on his future life. There could be no mistaking the motives ; the very atmosphere in which the parties have been brought up is, so to say, charged with them. If the parents of the bride afterwards find the advantage all on

one side, why did they incur contractual obligations, the effects of which in case of mischance, as they knew, would be so crushing? Why did they not try to secure in the beginning, what they afterwards claim, as fairer terms? There could be only one answer to this question, and that is, that they were at the time so impressed with the sense of what they then believed to be a religious duty and the exercise of a social right in the best interests of the girl (but which they afterwards stigmatise as barbarous and cruel), that they durst not at the time question even their own minds on the point. There is no room for two opinions on the moral conduct of a party, who, with open eyes and a sound mind, incurs contractual obligations of a particular nature, but, finding the tide against, tries to shirk them by abuse. The more manly way is to bravely face them, as affecting the spiritual welfare of a third party (the deceased husband), who cannot then interfere to prevent their breach; and, so far, it must be admitted that the orthodox are right. I believe the more honest way for reformers and friends of re-marriage is to begin at the very beginning; to work on the convictions of the people; to determine the marriage conditions more definitely; to awaken the people to the uncompromising nature of the contract; to teach them the necessity of self-help in the matter by restricting the conjugal obligations on both sides for the period of the natural life of either party. There would be no injustice then to either side; there would be no shirking of self-imposed duties; the salvation of no third party would be at stake; and the much-coveted reform would follow as a necessary consequence. The present mode of working out the reform is only like lopping off a few side-branches, leaving the trunk and the roots undisturbed. No wonder that by cutting off the few supernu-

merary shoots the stem and the radicles are better fed and wax stronger; the orthodox get more rooted in their prejudices and become morbidly wary of any suggestion of reform from whatever quarter. As matters stand at present, the reformers may well be regarded as abetting people to break their most solemn contracts. But by adopting the above-mentioned procedure, the line of action would be clear and unequivocal, and, while saving much bad blood on both sides, it would touch the very root of the mischief. One of the best ways of accomplishing this is to promote intermarriages and widow-marriages between different castes. Persons and castes that have thrown away the sacred thread, and thereby the pretensions to a certain spiritual status, should at least have no scruples to such marriages. But the plan of setting about the work often produces results diametrically opposed to those intended. The reformers, frantic with zeal, wish to destroy things, simply because they are old, leaving a void which they have no manner of notion how to fill up; in other words, their genius is pre-eminently a destructive one. Caste (or rather the distinction of caste) is the first victim of their blow; and in their haste to raise the status of the lower castes, they do more harm than good. The inferior castemen, in the foolish hopes of equality with the higher castemen, give up the very customs and practices, which, as being peculiar to the lower caste only and as such hitherto eschewed by the higher, they now learn to regard with a degree of horror as unworthy of their regenerated selves. This is no phantasy of a heated or warped imagination, but a fact that has latterly happened in several castes. One of these castes which was formerly regarded as outside the pale of the Vaishyas (merchant class), and was thus free from many of the disabilities to which the three higher classes

are subject, only lately abolished, by a unanimous verdict, widow-marriages, exactly the thing for which the reformers are craving. Thus the trodden ground will again have to be retraced when the time for real reform comes. If, therefore, instead of trying to remove caste distinction by raising the status of the lower, the reformers were to persuade people to revert to the old system, leaving alone those that are best fitted for the service of religion, and to discard all the insignia of such lofty status, in fact as well as in name, and to join in brotherly co-operation in introducing such reforms as would be best suited to the more worldly character they have now openly adopted, the consummation of the much-needed reforms would be easy. What good a man who styles himself a high-caste Bráhman, while engaged in practices hardly creditable to a Sudra, does to himself by keeping up the inconvenient appellation of a high-sounding name is not easy to see. From top to toe he is a menial (Sudra), doing mercenary work for pelf; ofttimes does and dips into what a good Sudra would be ashamed to put his hand to; and yet, like a proud beggar that would rather starve than work, suffers all the inconveniences which a high-sounding name entails. Now this in itself is a vital departure from the commands of the holy writ of the Hindus. "A Bráhman," says Manu, "unlearned in holy writ, is extinguished in an instant like dry grass on fire." It is frequently inculcated that he derives his name, not from birth alone, but from his knowledge of the Vedas. In fact then such a man is anything but a Bráhman and ought with convenience and benefit, both to himself and society at large, to throw away the cumbrous appendages of an empty appellation. The Shástras also allow to those that have the courage to renounce a meaningless name, in case they find their mental vision

widened and become both physically and intellectually fitted for higher spiritual flights, to get back into the castes they left, and again be in the receipt of all those advantages they enjoyed before. This would tend to restore the original genuine distinctions of the four primitive divisions, when, irrespective of birth, a man's caste was determined by his mental tendency or natural gifts for particular avocations. Intermarriage would thus become more common as it was in Vedic times, but with this difference, that while in the post-Vedic period of Indian history the degradation of the offspring of such marriages was intended to act as a check upon the free indulgence of this custom, we, in these times, will have none of those restraints. That intermarriage existed between all the four castes at one period of our history is clear from the historical evidence we have of the origin of Vyasa—the compiler of the Vedas—the son of a Rishi by a fisherman's daughter, while several of the other eight great Rishis are of doubtful origin; Páráshara, the son of a Chandal woman, and Nárada, the son of a Dasi or slave-girl. If the antiquity of the Vedas be fixed at 4000 B.C., we have a picture of Indian society of the period in the above examples. This practice of intermarriages also throws a side light upon the social condition of the lower classes in those days as showing that they must have been regarded as not entirely outside connubium by the higher classes. A very large proportion of the Hindu population is, if the Puranas are to be believed, the offspring of these mixed alliances. Thus even through all the mythological accounts given of the origin of castes the truth leaks out.

In the Vayu Purana there is a somewhat similar passage (quoted in Muir's Sanskrit Text, Vol. I., p. 29). In speaking of the Treta age, the author says there

were then no castes, orders or varieties of condition or mixture of castes; they were alike in form and age without distinction of lower and higher. Thus it appears more reasonable to treat all four classes as originally homogeneous, but divided into two great classes,—the pastoral and the agricultural, and we have in the present day the type of these two classes in the two most numerous of the Hindu castes, the Gopas or Goálas and the Kumirs of Upper India.

"They formed the rear material on which Brahmin and Buddhist priests and reformers successively worked —the horizon from which other classes arose or fell. It is obvious that Brahmins, Kshatriyas, and Vaisyas, each strictly following the position assigned to them, could not from their very constitution have had separate or distinct national existence. Isolated, they would have been as *disjecta membra*, wanting a stomach and digestive organs." (Dalton, p. 306.)

On the other hand, for the undisturbed application to their work by these classes, and for their very continuance, it was necessary that there should be a body of men skilled in the art of warfare. As enhanced skill in various arts is as much the result of inherited talent as of long and continuous devotion to the work, the maintenance of a class of warriors for their protection became a necessity, and thus arose the class of warriors who from their natural prowess and the monopoly of arms usurped all the power in the land to themselves, and thus, in course of time, as they became raised above the mass, they learnt to pretend a higher and nobler descent than the children of the soil.

The Brahmin class seems to have proceeded much on the same lines, and followed the same process of evolution and elimination, though they are sometimes regard-

ed as the descendants of Rishis or Munis, the magi or sages, who hailed from the land of the Pharoahs, and, settling in India as missionaries before the influx of the Aryans, married the Aryan girls indiscriminately of caste when the latter race became the masters of the soil. Tod in his 'Annals of Rajasthan,' tells us that in the early ages of the Solar and Lunar dynasties, from which the Brahmins and Kshatriyas spring, the priestly office was not hereditary in families; it was a profession, and the genealogies exhibit frequent instances of these races terminating their martial career, abandoning the world, and starting a religious sect, and their descendants sometimes continued in the priestly office and sometimes reverted to the profession of arms; but after the conclusion of the struggles between the two lines described in the Ramayana, the military class appears to have withdrawn from all desire to enter the priesthood. Thus in those days there was no hereditary priesthood. The priestly offices were held by men told off or called to the work who were required or inspired to live for years a life of meditation or seclusion as a prepartion for the profession.

In lapse of time, when the Brahmins became the repositories of all the learning of the age, they called themselves earthly, or bhûdev gods; and though the most opprobious epithets and the vilest offices were assigned to the tillers of the soil as created to minister to the wants of the three higher classes, the former class never became enslaved. Indeed, in some of the oldest Vedic accounts, not altogether uncomplimentary names are given to them, as '*the nourishers*,'—a good name, says Mr. Edward Dalton, for those to whose labour the earth yielded her riches for the benefit of all classes.[1]

1 Dalton, p. 307.

A second and more direct evidence of the superiority of the lowest class in those days is supplied by the etymology of the term *Sudra*, which is *Sud*, or *Sudh* or *Sudhar*, meaning *pure*, and, as such, includes all castes, as distinguished from Kol (a word of uncertain meaning, but certainly not complimentary), vile or impure, or *Chuar*, robber, or *Diku*, the term applied to the aborigines. Thus Sudra means to purify. If the Sudras had always been regarded as a helot race, born to a servile condition, why should this honourable epithet have been applied to them? I think it was of old, what it is now in Chotta Nagpur, the term by which the Aryans *en masse* chose to distinguish themselves from the Dasyus, or Kols. They were all "the pure people," but the twice-born, the first three classes, were the lords spiritual and temporal and the knights and burgesses. The fourth class were the ordinary people.

Or, again, strictly interpreting our great Shastric sages, for the benefit of our orthodox friends, we cannot avoid more or less the same conclusion. In the well-known ninth and tenth chapters of Manu Smriti, which treat of the commercial and servile classes, and mixed classes, Manu gives clear and explicit reasons for the multiplication of castes, and which is also indicative of the fact that non-Aryan races also had begun to intrude upon the caste system and taken a touch from it, as is happening at present in the case of the Kochh inhabitants of Rungpore—a tribe of the aborigines who now style themselves as Rajbanshis or Bhanga Kshatriyas, thereby intending to convey that they are an outlying branch of the Kshatriyas who fled to North-Eastern Bengal to escape from the wrath of Parasu-Rama; or what has happened in the case of the Bhumij as of Western Bengal—a pure Dravidian race—who have lost their

original language and speak Bengali, who worship Hindu gods in addition to their own, and who employ Brahmins as family priests.[1] These mixed classes are represented as having arisen from the mutual connubium of the higher castes with the lower; thus the Chandala,[2] the abomination of all the castes and "the most contemptible mortal," is the offspring of a Sudra with a Brahmin woman, but in reality half a Brahmin; and from the union of a Kshatriya man with a Sudra woman sprang the Ugra—half a Kshatriya or half a Brahmin, according as the Kshatriyas may be regarded as an altogether independent class with a special creation or descended from those Brahmins with a martial spirit who were told off to the warrior class—and who were to live by hunting animals—the profession of a Kshatriya—but only to hunt those animals which live in holes.[3] Then follows the enumeration of the pure castes which are produced by the mixture of the pure and the impure castes and their offspring, with certain inborn tendencies and special avocations. Thus even in these impure castes, our orthodox friends must perforce, from the instances cited above, admit the blood of the regenerate classes—and as such not altogether so servile as supposed by them, and consequently there could not be an unspeakable sin in intercoursing with persons tinctured with their own blood, and so far as the Kshatriyas and Vaisyas are concerned with the blood of the class or classes higher than their own. One thing is thus certain—how from the original four castes, an unending series of castes has been developed, and as giving examples of contemporary customs, Manu states that connubium between the higher and the lower castes was

[1] H. H. Risley, The Tribes and Castes of Bengal, Intro. p. XVII.
[2] Manu, X, 12.
[3] Manu, Chap. X, 9, 49.

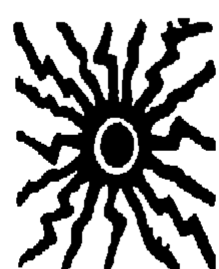
common in his time, in spite of the stain branded upon such births; and that as various nations, races, and communities, though separated by immense distances and disunited by conflicting faiths are still regarded as the representatives of great divisions of the human race, Aryan or Dravidian, or others, similarly disreputed castes are in reality the main representatives of the ancient Varnas; in fact, "certain tribes now designated as Sudras are in reality more Brahmins and Kshatriyas than anything else. In short, they have become as much absorbed in other races as the Celtic tribes of England have become absorbed in the Anglo-Saxon race; and their own separate individuality, if they ever had any, has completely vanished."[1] Besides those mentioned above[1] there have been other causes at work in destroying the original line of demarcation between the three higher castes and the Sudras. Those regenerates who became outcasted naturally entered the lower castes, and their descendants also were cut off from the higher, &c. Again, the practice of infanticide among Kshatriyas, especially the Rajputs, occasioned the want of girls in that tribe, and they were long obliged to seek wives from the lower castes, especially the Raj Bhars, who were thus transformed into the second caste of the *Dvij* or twice-born.

The fact is that many customs that now obtain among the Hindus appear departures from the letter of the Shastras, and it may well be asked why we are not to follow in the footsteps of our forefathers in the matter of change, whenever it is lawful or expedient to do so. Process of change is the principle common to all forms of life, and the whole creation is constantly moving either

[1] Shering's Hindu Tribes and Castes, Intro. p. XXI.

backwards or forwards; old forms and systems change—they have their day and cease to be—for we live by change—all things work together for some final good.

We should then be acting in unison with the spirit of all times and of the Universe, if we try to work out our perfection from stage to stage, gradually and regularly, with energy and confidence, but, above all, without haste or violence, till we attain the highest. Thus, our quarrel is not with the past—we will not mourn or abuse it, for it had its due place in the working out of the beneficent designs of the Creator, by fitting us morally and spiritually for higher forms of life, for the glorious era when all shall be free and equal.



AURUSA PUTRA

OR

HINDU LAW OF INHERITANCE,

AS BASED ON

RELIGIOUS BELIEF AND CUSTOM.

"Illusions are hard to overcome."

THE title of this paper may strike one as a subject most within the pale of an Indian law journal than one pertaining to a branch of Anthropology. But the civil law of the Hindus, especially questions of succession to property, are so intermixed with their religious beliefs, customs and observances that apart from forming the ancient customary law of the country, they have an interest of their own for all students of human research, how far in temporal matters it is possible to find a complete religious undercurrent governing them, with the object of securing salvation in the next world to the soul of the deceased Hindu whose property the putra, *i.e.*, son and heir inherits only as a means to that end, but not otherwise. Apart from its anthropological interest, the consideration of the question has a wide bearing and a present-day interest and importance in India. Plain to the Hindu mind the question presents

difficulties to a non-oriental observer, and has therefore received such scant justice at the hands of previous writers on Hindu civil law, with such results in the domestic circle as also in the halls of justice, that I have thought it proper to submit the other, and the oriental side of the shield, for consideration on its merits.

I may also add that the subject-matter of the paper was suggested to me by the question No. 14 of Mr. H. H. Risley's Ethnographic Glossary sent by the Government to the Anthropological Society for information, in answer to which the paper was primarily intended, but as its scope and dimensions increased during treatment, it was thought better to read it in the form of separate lectures before this Society.

"Deus facit heredem," says Glanville: that is, heirship properly so called "arises only from natural relation." (*a*) And even supposing the succession of the offspring to the parent to be common all over the world, yet it is so modified by different usages and customs of different countries, or, by the State, from motives of public policy, that it is far from being an invariable natural law. Thus the rules to succession, being in their nature arbitrary, are merely conventional. Amongst one people the rules of primogeniture are established; another recognises the right of equal succession among the male members; while a third admits the female offspring to succeed along with the male, some in equal, others in unequal, proportions. Succession by right of representation as continuing the *persona* of the deceased by inheriting an indivisible aggregate of rights and duties is the distinguishing feature of the Hindu law of inheritance, as was characteristic of the old Roman law, with

(*a*) West and Butler, p. 59.

this addition that religious fitness (as determined by certain fixed rules) is a *sine qua non* in the Hindu heir.(*à*)

"Among the Hindus, the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or not performed by the proper person, no relation is considered as established between the deceased and anybody surviving him, the law of succession does not apply, and nobody can inherit the property. Every great event in the life of a Hindu seems to be regarded as tending up to and bearing upon these solemnities. If he marries, it is to have children who may celebrate them after his death ; if he has no children, he lives under the strongest obligation to adopt them from

(*à*) Colebrooke's Law of Inheritance, Introduction.—The doctrine that a man is born again in his son seems to have grown out of the requisites of the primitive constitutions of both Roman and Hindu societies, independently in each. " The husband enters the wife (in the shape of a seed), and when the seed is changed to an embryo, he makes her a mother, from whom, after having been regenerated in her, he is born in the tenth month. His wife is only then a real wife (JAYA from JAN to be born) when he is born in her again." (Haug's Translation of the Aitareya Brahmanam, Book vii , chap. iii., 6 and 7, p 461.) The principle is identical with that " in the pure Roman Jurisprudence, the principle that a man lives on in his heir—the elimination, if we may so speak, of the fact of death." (Maine's Ancient Law, p. 190.)

The above quotation from the Aitareya Brahmanam may also serve as an answer to what Mr. Maine in his Hindu Law (p. 605, para. 488) says with reference to the succession of the widow to her husband's property, after quoting the following passage from Vrihaspati, " of him whose wife is not deceased, half the body survives. How should another take the property while half the body of the owner survives ? " Mr. Maine criticises, " It is obvious that this metaphor has the fault of many other metaphors. It proves too much. If the husband still survives, the sons cannot take. If the widow is looked upon as the continuation of her husband's existence, she ought to take even before male issue." Not necessarily. The son is the father born again. He therefore takes before the widow who is only half his body, especially if he is accepted by the father (mother's consent being implied) as his heir and fit to offer his *Sraddha*, by the performance of certain religious *sanskars*, such as sacred thread ceremony in the case of *dwij* or twice-born classes, and marriage among others.

another family†, 'with a view to the funeral cake, the water, and the solemn sacrifice.' "(*b*) Thus writes Sir H. S. Maine in his Ancient Law, and every Hindu knows how truly it represents one phase at least of their religious life. But the law, as at present administered in British Courts of law on this side of India, recognises the title of sons to ancestral *property by right of birth, irrespective of their performance of obsequies or other fitness. I shall try in* this paper to indicate the incorrectness of this view and how far it is in direct antagonism to the true spirit of Hindu law.

Hindu Law is ordinarily divided into three divisions of (1) Achara or established rules of conduct, including such subjects as education, marriage, funeral rites, &c.; (2) Vyavahara or worldly matters, including judicature and inheritance; (3) Prayaschitta, comprising penance, purification, transmigration, &c.; while each of these divisions has its own distinct province and purpose, they all group round the central idea of Dharma whose ministrants they may be said to be. The object of early writers on Hindu law, as remarked by the late Rao Saheb V. N. Mandlik, has been more to inquire and lay down the rules for Achara and Prayaschitta than about Vyavahara or the Civil Law. This needs to be clearly followed and realised by English judges and lawyers, in whose attempt to interpret the spirit of Hindu law in

† The learned author had been evidently thinking of the absolute power of the paterfamilias in the Roman law in the choice of his heir, when he speaks of the obligation of a Hindu to adopt from *another* family. Such an idea is, however, opposed to Hindu notions; the religious law defines the limits and directs the person desiring to adopt to make his selection from near relatives—members of the same gotra, and, if possible, take the nearest. See Vasistha, Chap. XV., Datt. Mim., II. 15, 75; Colebrooke's note to the Mitaks., Chap. I., Sec. II, para. 13.

(*b*) H. S. Maine, Ancient Law, pp. 191-192.

the light of European notions or to engraft upon Hindu law-terms, the meanings which like terms bear in European systems of jurisprudence with a disregard of their origin or the surrounding circumstances, great mischief is done. Another drawback of several modern writers on Hindu law is the disregard, nay, the utter contempt, with which they look at the religious rites of Hindus as so many absurdities woven round their civil life, and, in their inability to understand their import, they discover a tendency to divest every civil question of its religious texture with which it is inextricably tied up. It is impossible not to admire the patience and industry of several English authors on Hindu Law, but it is a pity to see them attempting, in their so-called philosophical disquisitions, to subject every phase of both civil and religious life of Hindus to certain hard and fast rules, and holding out a clear cut result with a faith in their soundness as if it were gospel truth, but often sublimely absurd. Thus they run riot over the field, and sow tares of error among the wheat of truth. The words and terms used in Hindu religion and law, when their meaning is investigated, will be found to be, as Lüther said of St. Paul's Epistles, living things which bleed if they are pricked. And so long as the spirit within them is not rightly read, "justice to the Hindus in matters of inheritance must remain uncertain because it would often have to depend on the reasoning of the European mind, which, failing to appreciate the historical facts and the religious ground on which Hindu reasoning proceeds, must necessarily often become fallacious." [1]

Amongst the Hindus, the most trifling event in life is interwoven with religious ceremonies in some form or

1 Goldstücker's Literary Remains, Vol. II., p. 102.

other. He must daily adore the household gods and offer *tarpan*, *i.e.*, oblations of water to his ancestors before taking his meals. As once remarked by an eminent Hindu, if a Hindu can do without food, he can do without ancestor-worship. If there is an auspicious occasion in the family, religious ceremonies begin days before, and ancestors are invited to ward off the evil during those days. If a Hindu is to start on a journey, similar ceremonies are performed with an implicit faith in the presence of dead ancestors as guardian spirits to protect from accident. His death-bed is marked by an under-layer of sacred rites based on ancestor-worship. Thus, from birth to death, a Hindu goes through a mass of ceremonies, which necessarily take up a large part of his life, and which would appear appalling to anyone not acquainted with Hindu society as it exists. At the basis of all this is filial piety which makes god of a man, and assigns to father and grandfather a place next to God only in rank. (*d*) The Shastras retain the same hold on the Hindu mind of to-day as they had 2,000 years ago. The Hindu of to-day has the same faith in their truth and efficacy as his forefathers in the days of Manu.

There seems to be no ground whatever for the insinuation made by Messrs. West and Bühler in their Digest that, in the present condition of Hindu society, the performance of all religious rites has become lax and irregular. They give no authorities for this sweeping assertion. If by 'lax and irregular' they mean that there is a slight departure from the Vedic *ritual*, they may be right, for more recent ceremonies modifying these have been both introduced and recognised. 'For in so far as the Hindu

(*d*) Sir James Campbell's Spirit-Basis of Belief and Custom. Sarvadhikari's Tagore Law Lectures, p. 89.

law of inheritance appeals to evidence based on religious grounds, it is quite immaterial whether the detail in the performance of this or any other ceremony concerned by it agrees with the teaching of the ancient or mediæval or even modern ritual, provided such a performance is held, rightly or wrongly, to be in the spirit of the orthodox faith.' (*e*) The question to be decided, therefore, is whether the popular mind believes in the efficacy of the Srâddha ceremony as benefiting the soul of the deceased relative. If the soundness and utility of a system is to be judged from the length of time during which it preserves its vitality, and exercises an influence on men for whom it is intended, the Hindu religion and law (for Hindu law is entirely based on religion) may be regarded as the most perfect system of moral and legal codes ever evolved out of man's brain, inasmuch as it is perfectly adapted to the conditions and needs of the men intended to bring within its influence, with enough of elasticity to suit the changed conditions of life in course of ages. With such a system of law and so religiously sensitive a people as the Hindus, it would have been thought no trouble would be too great to trace the origin and the primary meaning of every custom and question of law.

But, as it was, till very lately, only comparatively later works on Hindu law were consulted with a disregard of the older authorities. The confusion was increased by the Pandits of the Sudder Courts (employed by Government for the interpretation of the Shastras) who gave opinions as they had a predilection for one school or another—opinions which were received as sound Hindu law, but which, as a matter of fact, were tinged with

(*e*) Goldstücker, Vol. II., p. 215.

local prejudices, and were given, not always after a sound knowledge of law and full study of the texts and authorities properly applicable in each case, but according to their lights and opportunites, sometimes large, but more often limited. It not unfrequently happened that the pandits misunderstood the questions put to them, as in the Nuddea Raja's case, and were often misunderstood by the Judges, as the history of the growth of Hindu Wills in the three presidencies amply shows.

The mischief, however, grew out of the necessity. The Judges were ignorant of Sanskrit, and were unable *to found their decisions on a direct and immediate* knowledge of the original texts ; and either had to resort to translations, where translations were available, or to content themselves with what help they got from the Shastris or the lawyers in their pleadings, most of whom, with a few honourable exceptions, knew little of the spirit of the Hindu law or the distinctions between different law schools ; yet there was no attempt to remedy it as soon as opportunities were available. It is only lately, as remarked by Mr. Mayne in his Hindu Law, that an opinion has been growing up that we have been all drifting wrong, and that the only safety lies in reverting to antiquity—I should add—with a reservation in each suit for an enquiry as to the particular customs, if any, by which each party, as it considered, was bound. "For the Shastras refer, not merely to the customs of different districts, different tribes, and different families (Manu, I. 118), but to that general and immemorial custom which is 'transcendent law,' 'to the root of all piety, good usages long established' (*ibid.* 108, 110), 'to immemorial tradition' (II. 18), finally, to that

incontestable law which well-instructed Brahmins propound."(*f*)

"Indian law may in fact be affirmed to consist of a very great number of local bodies of usage and of one set of customs reduced to writing, *claiming* to a diviner

(*f*) Montriou on Hindu Will, Preface, p. v.

Custom or usage plays a very important part in Hindu law and is entirely different from what is understood by the term in Europe. It is 'the' main source of Aryan law from the earliest times, and the Hindu law books are merely the records of customs that existed in those days, or what their compilers thought they should be. The conflicting passages in the different texts are probably due to their composition at different periods, and may be accounted for by the changes the customs had undergone during the interval, for 'even India changes, though slowly.' "All the commentaries and digests derive their authority from, and profess to be based on, the codes of Manu and Yajnavalkya. They do not admit that there is any real difference between the laws laid down in the ancient works; and, wherever any such differences seem to exist, they either endeavour to reconcile them by the interpretations they put on their texts, or explain them away by the assumption of accidental omissions which they supply. And it is in consequence of such interpretations or additions that different conclusions have obtained in the Mitakshara and the Bengal schools, though both profess to derive their opinions from a correct and authoritative understanding of the same ancient texts."—(Goldstücker, Vol. II., pp. 146-147.) After a very careful examination of the ancient texts and later commentaries, Mr. Justice Dwarknath Mitter thus delivered himself in a full bench decision of the Bengal High Court, "And such differences of opinion as there exist between them and the fundamental treatise are entirely confined to a few cases of detail which involve no conflict of principle of any kind whatever." (Guru *v.* Anand, 5 B. L. R., p. 34.)

This pre-eminence of customs and usage is founded on the highest authorities. "Immemorial custom," says Manu, "is transcendent law" (Manu, I., 108). In the Mahabharata, King Dharmaraja extols usage above all with a marvellous unbelief in the utility of any other source of law —"Reasoning is uncertain, the Srutis are conflicting. That path is the (proper) one by which great men have gone." Nilkantha in his commentary on the passage says thus: "One should follow that path only which is approved by the majority of the people. (V. N. Mandlik, Mayukha, p. XLIV). Manu inculcates the same doctrine. The way of the good by which a man's parents and grandparents have gone should be trodden by him. (Manu I., 108—110, 118; II. 6, 12, 18; IV., 155—158; VIII., 3, 41.) Vijnaesvara admits that the texts on succession and partition are mostly recitals of what actually prevails in the world, meaning existing customs (Mit., ch. ii, l. 50, p. 1, quoted by Mandlik). Nilkantha in the Vyavahara Mayukha takes the same view, and compares civil law to grammar, as both being founded on usage. Yajnavalkya (I., 156) says that even dharma itself, if opposed to the usages and wishes of the people, is not to be practised. These quotations will serve to illustrate the danger arising from the fact of treating this or that treatise as decisive on a point of Hindu Law. "For usage is the main source of all law and is superior to the commandments of all Shastras put together." (Mahabharata quoted by Venkanath in Smriti Ratnakara—(Mandlik, Introduction, p. xliv.)

authority than the rest"; (*g*) its most distinctive feature being the order of succession based on religious efficacy. "The principle that the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor has been laid down on the highest judicial authority as an article of the legal creed, which is universally true, and which it would be heresy to doubt." "All the ancient Rishis or Hindu sages whose texts are regarded as the fundamental source of that law, and all the commentaries on it whose opinions are recognised as authorities in the different schools current in the country, are unanimously agreed in accepting these considerations as their chief, if not as their exclusive guide." (*h*)

Another peculiar feature of Hindu law is *the undivided family system.* Corporate property, as is well known, is the rule in the East, till the contrary is established. The early beginnings of society are marked by the same general features all over the world; and an article acquired by an individual soon comes to be regarded, as its need is felt or benefit recognised, as the property in common of the larger circle of which he is a member. Various causes peculiar to different places have operated, from time to time, to change the mode in which property is held. But, while in India, either joint families have developed into village communities, or village communities have disintegrated into joint families, the movement has ever been within these narrow limits; and it has never at large known other modes of tenure of property brought about by the progress of society elsewhere. Civilization, gradually multiplying the mutual relations and dealings of individuals in society, occasioned the

(*g*) H. S. Maine, Ancient Law.
(*h*) Mr. Justice Mitter in Guru *v.* Anand, 5 B. L. R.

sale and mortgage of property; and the facilities and benefits resulting therefrom strengthened the sense of individual property, at least in the case of self-acquisitions as soon as there was the slightest sign of the segregation of the individual from the family. In its devolution, however, from the acquirer to the heir, it put on its old fetters and became ancestral in the hands of the next holders. Debts of the proprietor became a first charge on the property thus received, and it was the sacred duty of the heir to discharge them. Thus a kind of spiritual bargain was established, and, from a community of worldly interests, there sprang a community of spiritual interests for the benefit of the *manes* of the last proprietor by performance of certain religious ceremonies—the Srâddha (faith or belief). The word Srâddha is derived from two Sanskrit roots, *Sra* truth, faith, devotion, veneration; and *dhà*, to hold. The word accordingly signifies the holding or belief in truth, hence an act prompted by faith. As a dishonest or a bad heir might try to evade this just responsibility of satisfying the debts of his benefactor and release his soul from the hell called *Put*, the next step would naturally be in the direction of the selection of a fit person in whom the holder of the property has faith, both to fulfil the civil responsibilities and perform religious rites for the regeneration of his soul. The simple performance of the ceremonies, as a matter of duty, was of no avail. As the word Srâddha implies, faith was essentially necessary, faith was everything; in other words, the performer must be one from whose celebration of the Srâddhas some spiritual benefit to the deceased is likely to arise. A man can consequently exclude any of his sons for a congenital defect or for disease of a virulent and obstinate type which entailed religious, and, as a result

thereof civil, disability and sometimes even for want of mutual faith, from participation in his property.* Says Nárada: "Women, sons, slaves, and attendants are dependants; but the head of a family is subject to no control in disposing of his hereditary property." (*i*) This extreme course was scarcely ever resorted to except in very flagrant cases, and, in the nature of things, selection generally fell to the lot of the eldest legitimate son. "The eldest was begotten from a sense of duty; others are considered as begotten from love of pleasure." (*j*) To secure the performance of religious sacrifices, which it was the part of the deceased owner to maintain in his lifetime, and which after his death he is entitled to share, and to avoid even the remotest chance of failure, an elaborate and far-reaching scheme of succession was provided which recognised twelve kinds of sons.† Most of these, however, soon fell into desuetude. The one that continued to be looked upon with great favour was the *Aurasa putra*—the son pro-created on the lawfully wedded wife—the legitimate son, or literally the hell-saviour as oblation-giver. The origin of the word Putra (son, hell-saviour) from Put (a specific hell) is as well-known as it is ancient, and one founded on the innermost convictions of the Hindu mind. "Since the son (*trayate*) delivers his father from the hell named *put*, he was therefore called *putra* by Brahma himself."‡ A mistake is, however, made in the application of the term. A child immediately on its birth does not become a 'putra,' but is only called "Suta" (begotten) and the father is termed "Janak" (begetter). It is only after

* III. Cole, Dig. Bk. V. T., 318, 320, 321 Comm., pp. 300—308.

(*i*) Narada, iii., 36.

(*j*) Manu, ix. 106-107.

† West and Bühler, p. 215.

‡ Manu, IX., 138; Vishnu XV., 43.

the performance of certain religious ceremonies that the one is termed '*Pita*,' nominative singular of '*Pitru*,' protector, father, *i.e.*, ancestor, and the other 'Putra,' hell-saviour; and only then they are regarded as jointly interested in the property, as '*vadil*', ancestor, and '*varas*,' one entitled to the property. Now, although a legitimate son is termed an *Aurasa putra* from the time of his birth, he in fact does not become so till he is accepted as such (*i.e.*, one in whom the father had faith as a fit person to perform his obsequies) by the completing of certain Sanskars, the last being thread-ceremony in the case of a dwij, and marriage in the case of others. To understand this proposition clearly it needs to be borne in mind that the whole fabric of Hindu religion and law is based on ancestor-worship, and property remains in the family only as a means to that end. Now, according to the Hindu Shastras, a child, when born, is a Sudrâ (one who had originally no right to property), and it is after the due performance of certain Sanskaras that he becomes a *dwij*, or twice born, and thus qualified to take part in the worship of his ancestors, the right to inheritance being only a means to that end, and incidental thereto.

It should thus be clear that the sons, according to the Shastras have no right to the ancestral property merely by birth. "Let sons regularly divide the wealth when the father is dead." (*k*) The natural inference from this is that sons have no right in father's property before partition, nor does partition ascertain a pre-existing right. After the death of the father and the mother, the brethren, being assembled, must divide equally the paternal estate; "for they have not power over it while

(*k*) Narada, 13, 2.

their parents live" (*l*) "because they have not ownership at that time." (*m*)

Chandeswara, Callucabhatta, Nachaspati, Misra, Jimuta Vahana, Raghunanda and the rest observe, by the term "*divide*," partition is intended; from ordaining partition after the death of the father, it follows that ownership vests after his death, else why should they not divide the estate earlier? (*n*) Devala, too, expressly denies the right of sons in their father's wealth. "When the father is deceased, let the sons divide the father's wealth; for sons have not ownership while the father is alive and free from defect." (*o*) Srikrishna concludes his commentary on this passage thus: "Because the relation of birth is superior to every other, as son standing in that relation—not any other relative—has the right of succession to his father's wealth immediately on the extinction of his father's right." Thus the passage expressly denies the rights of sons by birth while the father's property subsists. This proposition also derives support from the following fact:—In the case of goods left by one of several brothers or a relative living together as a member of a joint family, "the property of the rest of the brethren or other heirs must, however reluctantly, be acknowledged to arise either from his death or from the survival of the rest at the time of his decease." (*p*) Similarly in the case of a son living jointly with the father; the survival or demise of the ancestor is a requisite condition for the vesting of the property in him, the partition being left to the choice of

(*l*) Manu IX., 104.
(*m*) Manu VIII., 416.
(*n*) Cole, Digest II., p. 521.
(*o*) Jimuta Vahana I., 18.
(*p*) Jimuta Vahana I., 25.

the successors. (*q*) Similarly the text of Sankha (*r*), which Mr. Mandlik puts more clearly in his own words, runs thus :—" Notwithstanding the undisputed ownership of the sons in their own acquisitions, they are dependent in regard thereto ; how much more so (must their dependence be) in regard to acquisitions by the father. And this dependence has reference to *partition,* (the performance) of voluntary rites, dealings and the like." (*s*) Harita says, " While the father lives, the sons have no independence, in respect of the receipt and giving of property, and partition (of wealth)." (*t*)

" The father's property also ceases, by his degradation from his tribe, or disregard of temporal matters." (*u*) If, however, his mind be perverted and his body afflicted with a lasting disease, then the partition may take place, " but not if the father desire it not." So S'anc'ha and Lichita explicitly declare : " If the father be incapable, let the eldest manage the affairs of the family or, with his consent, a younger brother conversant with business. Partition of the wealth does not take place, if the father be not desirous of it, when he is old, or his mental faculties are impaired, or his body is afflicted with lasting disease. They are not independent while they have their father living" (*v*). 'A division of the ancestral property does not take place without the father's choice : since Manu, Narada, Gautama, Bhaudhayana, Sankha and Lichita, and others (in the following passages) "they have not power over it"; (*w*) " they have not ownership while

(*q*) Manu, IX., 11.
(*r*) Vir. 1, 161, p. i., and Vya. Mayu.
(*s*) Mandlik, Vya. Mayu., p. 33.
(*t*) Ibid. p. 33.
(*u*) J. V., ch. i., § 44.
(*v*) Ibid. § 42.
(*w*) Manu, IX., 104.

their father is alive and free from defect"; (*x*) "while he lives, if he desire partition"; (*y*) "partition of heritage by consent of the father" (*z*); "a partition of the estate being authorized while the father is living"; (*a*), &c., declare without restriction that sons have not a right to any part of the estate while the father is living, and that partition awaits his choice. (*b*)

Jimuta Vahana would even go further and says, "Partition may take place by the father's choice, while his right of property endures provided the mother's courses have ceased." (*c*)

The author of the Dayarahasya in the commentary on this passage says: "If the father be not a householder, 'that is, if he become an anchoret or ascetic,' and if he be 'devoid of affections,' if he do not care for his wealth; if there be a relinquishment on his part through aversion from trouble, though he continue to be a householder; then the father's voluntary relinquishment, his quitting the order of a householder, and his degradation from his class, are declared to be causes of annulling his property." (*d*)

If the father voluntarily makes a partition in his lifetime he takes a double share of the property ancestral. Vrihaspati says: "The father may himself take two shares at a time made in his lifetime"; and Narada, "Let the father, making a partition, reserve two shares for himself." (*e*)

(*x*) Cited as from Narada, but is part of a passage of Devala.
(*y*) Gautama, XVIII., 2.
(*z*) Baud'hayana.
(*a*) Sancha and Lichita.
(*b*) J. V., ch. II., 8.
(*c*) Ibid., § 32, 39; also Vir. I., 170, p. 2.
(*d*) Colebrooke's Law of Inheritance, p. 150.
(*e*) J. V., ch. ii., § 35.

Vishnu says: "When a father separates his sons from himself, *his own will* regulates the division of his acquired wealth; *but in the estate inherited from the* grandfather, the ownership of father and son is equal" (*f*). The latter part of the passage is interpreted by one class of lawyers as illustrative of the son's vested right in the hereditary property by birth. It, however, hardly stands the test of logic. The use of the words *by his own will* in the first half of the sentence would imply the *want of will* to be imported as understood in the latter half of the sentence, where a contrary meaning is intended to be conveyed. If so, the passage would simply mean that the father is not entitled to make a distribution of greater or less shares at his caprice as in the case of his own acquired property, but shall, so far as possible, make equal or uniform shares. "Equality among the heirs," said Lord Jutsice Innes, "is, as we understand, the spirit of that (Hindu) law."† But it is not an absolute mandate. Yajnavalkya says: "The father is master of the gems, pearls and corals and of *all* (other movable property), but neither the father, nor the grandfather is so of the *whole* immovable estate." (*g*) This passage from Yajnavalkya is laid hold of by birthright writers to support their theory of the father having no right over ancestral immovable property whatever, but only over movables. The use of the word "*whole*," however, before immovable property clearly indicates that it is merely a recommendatory injunction forbidding the gift or other alienation of the *whole* immovable property, and not an absolute limitation of the father's power of divesture, for property is the chief means of supporting the family, and maintenance of the family is enjoined by the

(*f*) Vishnu, 17, 1-2. J. V. ch. ii, 16, 55, 76.

† See also J. V., ch. iii., sec. ii., vers. 24—27.

(*g*) Mitakshara I., sec. i., 21.

Shastras as an indispensable obligation. (*h*) It is true the orthodox Hindu regards the claims of his children and dependants as indefeasible; but as Jimuta Vahana says, "the prohibition is not against the gift or alienation of a small part compatible with the support of the family" (*i*); and if the family cannot be supported without the sale of even the whole of the immovable property, it may be sold or otherwise disposed of as is expedient. (*j*)

"If the father recover paternal wealth, not recovered by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." (*k*) This passage from Manu is forced into their service by the exponents of the birthright theory, that since the sons cannot force the father to partition such wealth against his will, the partition of hereditary wealth not so acquired at the *choice of sons* is clearly deducible. This is a twisting of the plain meaning of the text which only means that the father need not distribute the grandfather's wealth which he has recovered, but MUST DISTRIBUTE the father's wealth not so acquired, *at his choice* but *not according to his mere caprice* (*i. e.*, unequally). (*l*)

The text of Yajnavalkya concerning the equal right of father and son is often cited in support of the birthright theory. It is, however, differently explained by Raghunanda and the learned Udyoota. The passage in question runs thus: "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, (*m*) or in chattels." (*n*) It is thus commented

(*h*) J. V., ch. ii., § 23.
(*i*) Ibid. ii., sec. 24.
(*j*) J. V. ch. ii., § 26.
(*k*) Manu IX., 209.
(*l*) J. V., ch. ii., 15, 16.
(*m*) Yajnavalkya 2, 122.
(*n*) Corrody (*niband' ha*) is explained by Sricrishna as signifying anything which has been promised, deliverable annually, monthly or at any other fixed period. Raghunanda would, however, have it mean "a fixed amount granted by the King or other authority, receivable from a mine or similar fund."

on by Raghunanda in Dayatatwa: "In regard to the land, a corrody, or slaves though acquired by the grandfather; as the father has the property of them, *in right of his being the person who presents a funeral oblation* at solemn obsequies, so, if his property cease by death or other cause, his sons have a right, though their uncle survive, to so much as should have been their father's share." Udyota interprets that 'when one of two brothers, whose father is living, and who have not received allotments, dies leaving a son; and the other survives and the father afterwards deceases; the text, declaratory of similar ownership, is intended to obviate the conclusions that the surviving son alone obtains his estate, because he is next of kin. As the father has ownership in the grandfather's estate, so have his sons, if he be dead. There is not in that case any distinction founded on greater or less propinquity, for both confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies.' (*o*) Thus the heir's preferable right appears to rest on his presenting the greatest number of beneficial oblations. (*p*) The importance of the exequial ceremonies, from a legal point of view, cannot be overrated. It is the bounden duty of the sons and kinsmen of the deceased to perform them; loss of inheritance is the penalty enjoined for their neglect or omission. † Manu quotes from Brihaspati that a "son who neglects the duty of redeeming his father is like a cow which neither affords milk nor becomes pregnant"; he has no claim to the paternal estate. In like manner Yajnavalkya shows succession to property in right of the funeral oblation, "among these (sons) the next in order is heir

(*o*) J. V., ch. ii., 9.
(*p*) Goldstücker, II., p. 157.
† Sarvadhikari, p. 77.

and giver of oblations on failure of the preceding." (*q*)

Nor is Yajnavalkya a blind upholder of the right of sons to demand partition during their father's lifetime. For he says : "If the father makes a partition, he may separate his sons (from himself) AT HIS PLEASURE, giving the eldest the best ; all may be equal shares." The passage obviously leaves partition (*r*) to the option of the father, as well the proportion of the share of each son, as determined by his estimate of their merits.

In answer to Mr. Borradaile's inquiries made in Surat and Broach about 1830, the Gujarati castes, almost without exception or qualification, denied the right of a son to demand partition against the wish of his father. So, also, a large majority of the castes (82 out of 101), from whom information was sought by Mr. Steele at Poona, replied that partition could not be enforced by a son against his father unless he had acted improperly as manager. (*s*) It would thus be seen that the usage of a large section of the people of the Deccan, and almost the whole of Gujarat accept the rule of Bhaudhayana as living law. "While the father lives, the division of the estate takes place (only) with his permission."

Though the law of the Mayukha is regarded as binding in Bombay, and of the Mitakshara in the Deccan, and their doctrines adopted by the Judicial Committee as applicable to all and sundry, we have, on the other hand, plain and indubitable evidence of the heads and representatives of the castes on points where these authorities are not accepted at all or only partially accepted. Answers to questions Nos. 11 and 12 of the Circular No. 8, relating to partition in Borradaile's Collection of Case Rules, say that even amongst the

(*q*) Yajnavalkya 2, 133.
(*r*) Yajnavalkya 2, 114.
(*s*) Steele, L. C., 216, see ib. pp. 405, 407.

Brahmins a son's right to partition is not fully admitted; and, amongst the lower classes, either there is no partition, or the father has the right of keeping in his hands so much as he likes of the hereditary property. In many cases the mother's consent is necessary, and every caste provides for her maintenance in any case. Sir William Jones thought that the text of Manu IX. 104, " After the death of the father and of the mother, the brothers being assembled may divide, &c ," would prevent partition without the mother's consent even after the father's death. (*t*) Indeed so great was the social degradation that the sons who had enforced a division of the family estate against the wish of their fathers suffered, that they are classed by Gautama and Apastamba with atheists and usurers—the men to be excluded from the funeral repast. "They were outcaste in Hindu society," says Sarvadhikari, "and were looked upon with contempt."

"There are a few texts," says Sir H. S. Maine, * "which have been thought to imply that the sons of an aged father could compel his retirement." And again, " But whatever may be the meaning of those texts, I cannot allow that they lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of the father."

Now let us examine the so-called birthright principle, and the contrarieties to which it leads when carried out in all its logical conclusions. Strictly interpreted, each son's birth ought to mark off a slice from the volume of the ancestral property, as it exists, at the time of his creeping into the world, so that, each successive son's share would be more or less as the property swells or

(*t*) Str. H. L., p. 251.

* Maine's Early Law and Custom, p. 122.

suffers during the interval. Thus that son would get the largest share whose birth discovers the property largest in bulk irrespective of his seniority or otherwise. Now this the birthright theorists would not have; they would have all the sons take equally in the property as it exists at the time of partition, and not at the time of each individual son's birth; in other words, they would have all the advantages of their own, as well as of their opposite system with the inconveniences of neither. Besides, there would be no incentive left to the father to make any savings from the income of the ancestral property, as all such savings would accrue to the ancestral property, and leave the father at the mercy of his sons, who would claim partition as soon as the property grew tempting enough. A shrewd father would immediately perceive that his interest consists in keeping the bulk of the property low, by spending all he might realise from the property. This brings the interest of the father into direct conflict with that of the son. If, on the other hand, the son's preferable right to property were made to rest on the acceptance of him as heir by the father by the performance of certain *Sanskars*, it would, by obviating most of the inconveniences of the other system, promote the peace of the family, and save hundreds of rich Hindu families from the ruin which almost daily overtakes them. The sons would see that their interest consists in obedience and good conduct, and the due performance of filial duties.

Again, if sons had ownership in their grandfather's property during the lifetime of their father, then if there be two brothers, one of whom has male issue, and the other has none, the children of him who has issue, on demanding partition, ought to participate equally with

their father and uncle, since, according to the birth-right writers, they have equal ownership. (*u*)

If, again, the birthright theory were correct, one might question on what secular grounds the blind, the lame, the deaf, the dumb, the lepers and those suffering from an absolute and complete loss of a limb, are excluded from inheritance. There could be only one answer to this question, *viz.*, that originally no civil disability, but religious unfitness, is the cause of disqualification. If this be true, it at once falsifies the birthright theory, and makes it a system of contradictions. Because, it is a matter of every day belief with Hindus that these, and various other maladies to which our flesh is heir to, are the penalties for sins committed by us in past states of existence, and that while the minor ones are expiable and removable (*v*) those of a virulent and obstinate type are not; and therefore entail disabilities rendering the afflicted incapable of performing the Srâddha, which is the test and title of a man's claim to the inheritance. (*w*) The sanctity and efficacy of the Srâddha ceremonies have possessed the Hindu mind in all ages. It is a deep-rooted belief with the Hindus 'that the spirits of the departed will find no rest, but will for ever roam in the region inhabited by the ghosts of the wicked men, and annoy their living kinsmen, till the Srâddhas are performed and the sacred *pindas* prescribed in the Shastras are offered.' The object which the three kinds of funeral ceremonies, the initiatory, the intermediate and the final, are intended to effect is "the re-embodying of the soul of the deceased, to raise his shade to heaven, and to help his progress in the 'ancestral region' of eternal bliss among

(*u*) J. V. II., § 11.
(*v*) Manu, XI.
(*w*) H. H. Wilson's Glossary of Judicial and Revenue Terms, see Srâddha.

his ancestors." The solemnity and importance of the Srâddha ceremonies is regarded as even greater than the offerings due to the gods. "An oblation by Brahmins to their ancestors," says Manu, "transcends an oblation to the deities; because that to the deities is considered as the opening and completion of that to ancestors." * A man may be pardoned for neglecting social duties, for neglecting many religious observances, but he is doomed to perdition if he fails to satisfy the manes of his ancestors or to present them with offerings due to them. As eloquently observed by Mr. Sarvadhikari: "This feeling may be condemned by the utilitarian matter-of-fact philosophers of the present day, but it will ever continue to be honoured by the priests of humanity in all ages and countries."

That the exequial rites occupy the prime position in all religious observances is brought out indirectly by another fact, known to all Hindus alike, the learned as well as the ignorant,—I mean "*sutaka.*" It is a matter of common experience amongst the Hindus that the death of a kinsman affects the purity of a Hindu's body, the degree to which it does being regulated by the propinquity of the deceased, and no religious ceremonies are allowed during the *period*, which varies from a day and two nights to ten days and ten nights. It is a period of social isolation, in which all intercourse with friends and relations is cut off, to the extent that a distant relation or a friend putting up with the family, on the happening of the event, cannot partake of the family's food and has to temporarily leave the house.†

* Manu III., 203.

† For fuller details on Srâddha, see Mandlik's Introduction to Mayukha, XXXVI., and pp. 187—192. Also Sarvadhikari's Lectures on Srâddha.

This disqualification extends to other causes, such as loss of caste (now inoperative according to Act XXI of 1850, as it does not affect a man's civil rights), vice, fraud and active enmity to the father. (*x*) "If the son is shown to be ill-disposed towards his father, &c., he cannot claim any share of the ancestral property but maintenance only"; (*y*) and again, if there be other sons endowed with good qualities, the inheritance is not to be taken by vicious ones; "for," says Manu, "all those sons who are addicted to any vice lose their title to the inheritance." (*z*)

To take another instance from usucaption. Suppose, "a father suffers land to be adversely possessed by a stranger during twenty years; since the property is divested, no right is vested in the son; for property dependent on relation to the father is resisted by adverse possession suffered by that father." (*a*) This is enough to prove that no property vests in the son while the father's title subsists; and that the only cause of succession is the divesture of the father's property, which is dependent on two main causes (see supra, pp. 14-15).

The religious efficacy principle derives further support from the law and practice of adoption. It is well known that when natural-born sons fail, the Hindus believe it an imperative duty to substitute one in his place to perform religious rites. The strong motives which influence a Hindu to adopt on failure of issues of their own loins could only be realised by those who fully comprehend the principles on which funeral rites are based. The Shastras lay it down as an imperative duty to beget

(*x*) West and Bühler, Digest, p. 587. III. Cole Dig., pp. 300—308.
(*y*) Ibid., p. 584.
(*z*) West and Bühler, p. 586, Borr., p. 132; Stokes, H. L. B., 109.
(*a*) Colebrooke; Digest II., p. 509.

a son; and when that is impossible, to adopt one, or, *to go a little backward* in history, to "have one, however produced."† "Heaven," says the Veda, "awaits not him who leaves no male progeny"‡; and again, "a Brahmin, immediately on being born, is produced a debtor in three obligations: to the holy saints, for the practice of religious duties; to the gods, for the performance of sacrifices; to his forefathers, for offspring. Or, he is absolved from debt who has a son."§

The son thus substituted in place of the natural-born son is termed Dattaka, when given away by his parents or guardians, and Swayamdattaka, when self-given. The sons so given do not become entitled to their natural father's property, although legitimate. Now, if the sons had a vested right in the ancestral property by birth, how did that right become extinguished? By the very act of giving away in adoption? If it were so, it argues absolute power in the father over his son's person, and consequently more so over his property since he can dispose of them in any way he likes. As no one can divest a vested right against that person's will, not even a Hindu father, it is but a natural conclusion that if the birthright theory were contemplated by the ancient lawgivers, they would certainly have reserved the right of the son to oppose an adoption willed by the father if he did not like it, since he had an already vested interest in the property. The fact is that the son has no vested right, and does not become entitled to anything except maintenance until after the performance of certain *Sanskars* and after his acceptance by the father (either

† See III. Cole Dig., p. 294. ‡ Cole Dig., p. 296.

§ Aitareya, Brahmanam, Book VII., Chap. III., 1. A popular Gujarati Proverb embodying the same idea, says, દેવ ઋણ, પિતૃઋણ, અને બ્રહ્મઋણમાં કદી રહેવું નહીં. "Never remain in debt to the gods, the manes and the Brahmins."

expressly or implicitly) as a fit person for performing the *Sraddha.*

I will treat of the other and more far-reaching effects of adoption later on, in connection with the offering of the pinda.

The Hindu view of marriage is another instance in support of the theory I am contending for. As remarked by me in my lecture on Hindu Marriage the Hindus regard it as "an act of paying off ancestral debt" by having a continual line of male succession, whose duty it is to give periodical offerings श्राद्धपिण्ड to the deceased for his repose; and so great is the importance attached by the Hindus to marriage, and to the act of pro-creation that even the periodical Srâdhha offering is excused during the marriage season, and the time during which the wife is *enciente* (at least five months advanced), the prospective birth of a son being held more than an equivalent for it. (*b*)

As mentioned in the beginning of the paper, the principle upon which one person is held entitled to inherit another's property is in direct ratio with the amount of religious benefit he can confer upon the deceased, as was remarked by the Judicial Committee in the case of Soorendronath *v.* Mt. Heeramonee, "There is in the Hindu law so close a connection between their religion and their succession to property that the preferable right to perform the Srâddha is commonly viewed as governing also the preferable right to succession of property." Manu, Yajnavalkya, and Jimuta Vahana lay down distinct rules for testing the conflicting claims of rivals by the "number and the nature of their offerings."

(*b*) See my Lecture on the Death-ceremonies among the Kapola-Bania and others, p. 4.

It is thus clear that, according to the Shastras, the sons have no title to or ownership in the ANCESTRAL property by birth alone; and it is here necessary to understand clearly the meaning of the term '*Ancestral property*,' wrongly conceived in modern text-books of law to be property belonging to the grandfather, in seeming contrast to the father's self-acquired property, and thus creating an erroneous impression that the father is a *persona* distinct from the ancestor. Such a view is not only misleading, but repugnant to the theory and conception of Hindu religion and Hindu law.

The reason for calling *one* sort of property ancestral and the *other* self-acquired, is that, when the father received the property from his father, he received it because he bound himself to perform funeral rites and make religious offerings and not simply because he was the nearest of kin to the deceased. He who performs the obsequies shall take the estate, for devolution of property is only incidental to that end. And this obligation cannot be considered to have been satisfactorily discharged as long as and until the father has established the relationship of ancestor and heir between himself and the person likely to succeed him after his death, by finally recognising his civil and religious status and thus authorising his heir to put his *pinda* (rice-ball) before the *pinda* of his (father's) father on the anniversary day of his death as well as on the day of his (father's) death. Unless at least seven *pindas* are worshipped no obsequial ceremony could be said to be complete, the first three representing the father, the grandfather and the great grandfather; the second three representing the mother, the grandmother and the great grandmother; the seventh representing any relations who might have

died an unnatural death, such as from snake-bite, drowning, &c. This shows that the grandfather's *pinda* cannot be worshipped DIRECTLY, but through the intervention of the father's; and the father's *pinda* cannot be placed until the father has acknowledged the fitness of the son as a person worthy to perform the obsequies and thus establish a spiritual relationship between the son and the grandfather,—himself forming the connecting link,—by some overt act, such as sacred-thread ceremony among the twice-born classes, and marriage among others. The willing performance of these ceremonies by the father is tantamount to such acknowledgment. It is not necessary in every case to signify this in writing.

Until he or they do not signify their wish to the contrary, or otherwise dispose of the son in adoption, the law presumes that such relationship is constituted between the parties. And the same analogy holds in the case of the failure of issue of one's own loins; the next-of-kin who succeeds him regards the person whom he succeeds as his ancestor; and on that assumption only he can regard himself as a properly constituted heir.

In support of the above, let us again take the case of the adopted son. He is, as a natural consequence, debarred from giving any oblations to the *pinda* of his natural father, and thus loses the right over his grandfather's property, as he cannot give oblations to his grandfather independently of the father in the natural line. It is the adoptive father who becomes his ancestor, and he is therefore required to give the *pindas* to him, and along with him to the relations three degrees removed, of his adoptive family, and he is thus declared

entitled to succeed to the property of the *adoptive father and others* in the family of his adoption.

This makes it still clearer that the property of the grandfather is not to be termed ancestral, independently of the father; but it is only termed so after the recognition as heir of the son by the father; and the distinction that is drawn between his property and his grandfather's property lies in the fact that the father has no right to give away or otherwise dispose of his father's property to the prejudice of the son whom he has recognised as heir, inasmuch as he has received it from his father on one condition only, *viz.*, that he should, in return, appoint an heir for the continuance of the obsequial ceremonies as remote as three degrees as stated above, and for which the property he has received is to be transferred by him after enjoying the benefit of it till death. This does not bind the father to treat his son as a joint-owner in the property acquired through other sources unless he chooses to do so, or in the property kept joint for the sake of convenience prior to the acceptance by him of a particular son; it, however, does not constitute a joint property incapable of separation. But it stands to reason that when he *continues* to hold it as joint after such recognition, so as to give the son to understand that the property so kept joint is a joint one, the whole property must be treated as joint and incapable of separation at the instance of his father, after such recognition of the son as heir.

The above ought to be held sufficient to prove the truth of the theory I am contending for, and the futility of the birthright principle. That occidental writers not thoroughly conversant with the daily life and observances of the Hindus imbued with a deep under-current

of religious motives should fail to grasp it, is both easily understandable as well as excusable; but the mischief it has done and is still doing to hundreds of noble Hindu families by promoting dissensions, fostering litigation, rending family ties and thus bringing ruin by completely diverting the course of inheritance, remains and is well exemplified in several well-known cases.

The fact is that both schools of law have been carried away too far by a blind partiality for their favourite doctrines, and that to have the truly sound principle we must strike somewhere between the two. As mentioned above, the relationship of ancestor and heir between the father and the son only arises after the undergoing of certain Sanskars by the son, the performance of the last being understood as a tacit acceptance of such son by the father as being a person in whom he has faith for performing his Srâddha. Thus when a son demands partition of the ancestral property, the primary question should be, not whether the father has any ancestral property (for all property in the hands of the father becomes such after the celebration of the last *Sanskara*) but whether the father has established that relationship between himself and his son which is not only an irrevocable step on his part, but also operates to the detriment of the son since he is deprived of the power of choosing an ancestor (adoptive father) for himself with whom he can agree and with faith in each other. To force the father, therefore, to acknowledge the so-called right of the son at a stage earlier than the celebration of the above mentioned ceremonies and without necessary qualifications or faith, and to give him, on his demanding partition, what the courts call *his legal share* of the miscalled and misconceived ancestral property, would be to unnecessarily fetter the right of property of the father who

has already done an essential part of his duty towards the manes of his ancestors and is on the lookout for that of his own. It would also defeat the very aim and purpose for which ancestral property is bequeathed ; for when the father marries his son and thus acknowledges his fitness to be his heir, he has some assurance of the perpetuity of lineage and the performance of exequial rites.

If this simple principle were followed, it would do away with all the present complications of law and the conflict of principles, and put an end to the interminable account-taking for separating the self-acquired from the ancestral property. It would leave the father a certain amount of liberty in choosing his own heir ; and to understand the character of him who is to be his saviour from hell he would put off as long as possible the events which are to place shackles on his proprietary rights. It would also indirectly operate to stop child-marriage, the event being dreaded as creative of new co-parcenary rights in the property, the effects of which may be far-reaching and not always favourable. It would, besides, give a certain degree of absolute power to the father over both his ancestral and self-acquired property, the human craving for his salvation in the next world and the parental affection that betrays partiality for his own blood always acting as powerful restraints to curb an unbridled whim of the father, if ever a victim of it, and limiting the circle from which, so far as may be, choice is to be made. In practice, however, one sees the eldest son generally getting the property because he is first entitled to it in absence of any physical disqualification or parental prohibition to the contrary. This would not justify one in premising his birthright. For a similar reason, the younger sons also get a share if they

are not discarded, primogeniture being not recognised by the modern Hindu law.

As such a state of things does not contemplate and excludes the very idea of devise by will, it is but natural that Hindu law should contain no provisions for testamentary disposition intended to take effect after the testator's death and should preserve complete silence on the point, having never contemplated its occasion and as being inconsistent with the very principles of Hindu law as founded on ancestor-worship or on the idea of the family property being for the maintenance of the members of the family, either of which principles would be subverted by the recognition of such an absolute power in a person as is implied in a will.

As the subject of Wills, its surreptitious and unnatural growth in the three Presidencies, and its recognition by the courts in spite of warning and denunciations by some of the highest judicial authorities and its consequent unnatural amalgamation with the true principles of Hindu law, is a wide and a comprehensive topic, I will reserve the subject for a future occasion and will only state that I have tried to present in a succinct form the true principles of the law of inheritance, for consideration on their merits, and as they are founded on religious belief and custom which is the true basis of all Hindu law, whose living embodiment is to be found in the social life of the Hindus, as it is lived over at the present day, a higher and more reliable authority than any number of judicial decisions given under a misconception of true law ; for a fact is a fact and cannot be altered by a hundred texts.

BETROTHAL

AMONG THE

KUPOLE BANIAS

(And some thoughts suggested by the subject of Marriage.)

BY

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It has been observed by Aristotle that the superiority of the Greeks lay, among other things, in the treatment of their wives, who were regarded as companions and help-mates and not as slaves. The Hindus may with equal pride appeal to the same test to prove the degree of civilization they attained hundreds of years ago by pointing to the treatment accorded in their Shastras to the females, and of which their marriage ceremonies, as existing today, form the living embodiment. The growth of the institution of marriage marks the evolution of society from barbarism to civilization, and the perfection it has attained in any nation or country is the index of its degree of culture. From the times to which the historical memory of man can go down to the end of the century we are near completing, this union of man with a woman has, broadly speaking, presented itself in three distinct phases. In rude states of society we find the possession of superior physical strength securing the prize—a circumstance which led to constant fights between tribes and tribes and was the chief cause of retard-

ing their progress in civilization—this was the marriage by capture in its crudest form, if it could, at all, be called by that name. Later on, on the settling down of tribes into society, we see it invested with various religious ceremonies, or what is called marriage by sacrament. Lastly, its recognition only as a social contract in America and elsewhere, depending for its continuance only upon the will, convenience, and the compatibility of temper of the parties, marks the final stage of its modification.

The last mentioned form of marriage is, to a certain extent perhaps, the most suited to the spirit and trend of modern times, and is very probably a revival only of an institution of older and simpler ages. It would, therefore, be both interesting and instructive to enter more fully into the subject of marriage by contract. In the first place it should be remembered that it is a marriage not distinct and separate from those recognised by Manu. It is highly probable that all the eight forms of marriage mentioned in the Mánav Dharma-Shâstra existed before and during the time of its author, and that Manu, seeing their necessity, gave them publicity and declared them all valid. Hence marriage by contract is an institution at least as old as its other prototypes.

Next as to the distinction between the marriage by contract and that by sacrament. The essential difference between the two is that while in the former there is nothing like the ceremony of सप्तपदी and कन्यादान, in the latter they form the very essence of it, and it is but natural. For the ceremony of सप्तपदी is supposed to bind the couple as man and wife for seven births, and hence the ceremony requires to be performed by a priest before the consecrated fire. While in the case of marriage by

who takes down the chatties, as she crosses the threshold, and the marriage knot is complete. The above forms obtain at present only among classes or castes which have no *gotras*. An analogical practice, however, prevailed in earlier times among higher classes known as "Niyoga," whose object was to keep the widow in the same *gotra*. It was a marriage by fiction and was free from many of the objections to which ordinary widow marriages were subject. If, however, a widow marriage be performed on the analogy of Niyoga by leaving out the "saptapadi ceremonies" and "kanyadán," the institution would soon become popular with the Hindus, as it would leave untouched the *gotra* of the family. The change of *gotra* is the natural consequence of "saptapadi" ceremony — a rite supposed to bind the couple for seven generations. The one great advantage of Niyoga marriage is that it enables the procreation of offspring on the widow of the deceased, and thus insure the continuity of his line.

Of course, when Niyoga was actually in practice in Aryavatra, its adoption by any one couple was allowed till such time as one son was born of such union to continue the line of the deceased husband of the female and to perform his obsequies. This practice had some sense in those olden times, when the *Grahshthashram* itself was restricted to the birth of a male child, which event, as soon as it took place, was the signal for the parents to retire into *Vanprashthashram* or the third estate. But now when *Grahshthashram* itself is indefinitely prolonged or fallen out of vogue altogether, and when the number of children is only limited by the parents' capacity for maintenance, there is no sense in restricting Niyoga to the birth of one male offspring only. And hence, if the practice should at all be revived, it would

be better for all concerned to enlarge its scope and usefulness, and invest a Niyoga couple with all the rights and privileges of a matrimonial status.

Marriage among the Hindus, which may be aptly defined as an everlasting fellowship of all divine and human rights, comes nearer the second order, and is invested with the sanctions of the highest religious character. " By no people," says Sir Thomas Strange, " is greater importance attached to marriage than by the Hindus. It is among them with one sex (the female) indispensable, with the other it constitutes the order of house-keeper (*grihshtha*), the second and the most respectable of the four by which with them the different periods of human life are distinguished. It completes for the man the regenerating ceremonies, and, being for the Sudra and for women the only one that is allowed, its obligatoriness is as to the latter among the ordinances of the Veda. Thus religion and law co-operate with the climate in its favor." *

Such being its character, it is no wonder that it has, in course of time, come to be overwhelmed by a mass of ritual and symbolism, many of which, though sublime and had for their object the impression of the deliberate, solemn and irrevocable nature of the step on the minds of the parties, they have now lost their signification ; but

* Though the religious ordinance with which the marriage is identified among the Hindus has the effect of getting every Hindu girl married (however incapable of fulfilling the marriage rights or physically disabled), the Shastras still record instances of women who remained single all through life for the very philosophical reason of avoiding miseries of dependence. In मंदोदरी उपाख्यान in देवीभागवत, मंदोदरी looks with disfavor upon her contemplated marriage and implores her mother the queen to allow her to pass a life of celibacy. Again वडवासिघेवी and सुलभामैत्रेची were ब्रह्मचारिणी all their life.

still the conservatism of the nation has not allowed them to die away out of deference to the very human instinct which invests everything old with a halo of sanctity and preserves it at least in form when obsolete in substance. The marriage rite as at present celebrated among the Hindu consists of several ceremonies which are mainly divisible into two classes : veswal (betrothal), and the marriage proper—the one according to Shastras, the other according to usage. The first of these I desire to lay bare before you today.

Veswal, though a part of marriage, is not a separate religious ceremony, and has not a separate place among the sixteen *sanskars*, being included in marriage, taking place, as it does, among some castes in writing, in others by word of mouth. It, however, precedes, and can only precede, the *sanskara* marriage or the marriage by sacrament, and never the *natra* or the *pat* marriage, which may be fitly termed the marriage by contract. It consists of a request and a promise of acceptance. There is no hard-and-fast rule as to the party from whom the request is to come, and it has varied at different periods of history, and even today varies with different castes, being determined by the laws of demand and supply. At the present day, in the majority of castes, however, it is the bride's party that takes the initiative and makes the request, and, in their hurry to outdo each other, have been chiefly instrumental in introducing the very pernicious custom of early marriage. The causes of this evil are manifold, and are due as much to the ignorance and luxury of the common people to have their daughters married as early as possible, as to the period when India was exposed to invasions from lawless Moslem tribes beyond its borders, and when the insecurity of life and property, and,

above all, the honor of the female sex, made the fathers anxious to marry their daughters as early as possible. A third and likely cause that has been suggested is the conclave of sages at the court of Janamejaya, son of Parikshit, who deprived females of going through the ceremony of *maunjibandhana* in the present Kaliyuga, and declared that in their case marriage should stand in lieu of the aforesaid rite. The effect of the changed condition of things was that it, while making marriage indispensable in the case of females, led fathers to hurry up the marriage of their daughters.

Fortunately, the Kupole Banias, the most advanced among the Gujerati castes, do not display the same over-anxiety for marriage, and as a consequence thereof it is not uncommon to find maidens of any age up to twenty and more in the community, infant marriages being comparatively few. All the same the parents are anxious to secure a good *ghara* (family), *i. e.*, to effect a betrothal as soon as possible and then wait their time. The qualifications of a good *ghara* are a good social connection, easy circumstances, and the respectability of the parents, which secured, the eligibility of the bridegroom is supposed to follow as a necessary consequence. The spread of education, however, has made a difference of late, and the boy is now as much, if not more, looked to as the parents, and in some cases his personal qualifications form the chief element in the determination of the choice. The right of selecting the bride or the bridegroom lies with the eldest male member of the family—the *pater familias* of Roman Law—who alone is *sui juris*, others having no will independently of his own ; so that if the grandfather be living, he has the right of determining the event, the consent of the parents being gathered from their behaviour pending the negotiations. Latterly,

however, the consent of the girl, if capable of understanding the nature of the act, is asked as to which of the *vars* suits her fancy. But in reality it is the female members of the family that have the lion's share in the management of the whole affair; it is they who discover a good *ghara*, open negotiations, control and determine the choice, fix the marriage day and make or unmake matches, and the males are well content to leave this to ladies as coming more within their sphere of action.

Who are eligible for marriage.—The eligibility of parties for marriage is clearly defined in the Hindu Shastras. "He who has not lost *brahmacharya* (chastity) let him marry a girl of (good) parts, who has not been accepted or enjoyed by another, who is attractive in his sight, who is not a *sapinda* of him, (and is) a junior; (who is) free from disease; who has brothers; who is descended from one whose *gotra* and *pravara* are different from his; and who is removed five degrees on the mother's and seven on the father's side." * Of the several qualifications said to be necessary in a bridegroom, one on which great stress is laid is that he should be one "whose manhood has been tested." † When no disqualification exists in either of the parties, the next step is to ask for the horoscopes, which are then submitted together to an astrologer, who is asked to see whether the starry aspects of the two agree, and whether the parties will form a suitable match or not. If the answer

* Mandlik's Translation of Yajnavalkya Smritis, §§ 52, 53, p. 167.

† Yajnavalkya, § 55. It may not be so widely known that this little recommendatory phrase was the cause of once a widespread evil among the Gujerati Hindus. Before marriage each bridegroom had to prove his manhood on concubines, at whose house he was openly sent by his parents and the relations of the bride out of what they thought a religious duty. The practice does not exist any longer.

is unfavourable, the horoscope is returned to the party to whom it belongs and the matter comes to an end; if the planet presents auspicious conjunction and forbode no evil, the negotiations proceed. It is, however, not very uncommon to dispense with this preliminary when the opposite party is much in requisition and business will not admit of delay. When this takes place, propitiatory sacrifices are offered for the omission, if the stars are discovered inauspicious after the marriage.

After this preliminary an auspicious day is fixed for the open declaration of the contract. On the appointed day the father of the bridegroom, or if he has none, his elder brother, or, in the absence of these, the eldest male member of the family, goes to the bride's house, exchanges cocoanut and a rupee smeared with saffron-tincture with the bride's father, and pays down, among the Gujeratis, any sum previously agreed upon, and among the Kupole Banias Rs. 401, as *palla* (dowry) for the bride to the bride's father, and which is credited to the joint account of the bride and the bridegroom. The festiveness of the occasion is marked by distributing treacle and coriander-seeds to all the persons present. Sometimes the bride is produced and the father recites the *gotra* and *pravara* and the names of the three ancestors on each side, and declares that he makes a gift of the bride free from any of the ten defects. "He who gives away (a maiden) without describing her blemishes is to pay the highest fine."* The representative of the bridegroom makes a similar declaration that he takes such and such a girl as a bride for such and such a boy, of such and such *gotras* and *pravaras*, free from impotency and other defects. This completes the betrothal ceremony, and at the time of departure a cocoanut is given

* Yajnavalkya, § 66.

to each member of the deputation. The representation of the cocoanuts on all festive occasions, and also in ceremonies performed for the propitiation of all natural elements, as the sea, etc., is probably traceable to a period when the human sacrifices were abandoned, and fruit sacrifices were substituted in their place, and the cocoanut in all likelihood was selected from its resemblance *to the human head.* The use of saffron-tincture is probably on account of its grateful smell, and is a natural accessory of that love of personal adornment which is common to the Hindus and the other primitive nations alike. Rice is emblematic of plenty and prosperity, and also suggests constancy and fidelity, which the Sanskrit word for rice (*akshata*) literally means. Sometimes the ceremony is performed to the accompaniment of tom-toms, and this as well as all other minor rites performed at the time are the necessary adjuncts of a step the solemnity of which could not be too deeply impressed on the minds of the parties, as also to give as much publicity to it as possible.

These ceremonies are the only ones performed on the betrothal day, but the tie which they have created establishes a long train of mutual social obligations and duties.

The next ceremony of any importance is that when, on an auspicious day, the bride's mother, and, if she be dead, an elderly female member of the family who is not a widow, goes to the bridegroom's house to invite him to partake of *lapsi.* At the time of departure the bridegroom is presented with a suit of wearing apparel, *paghdi*, and any odd number of rupees according to the competence of the family. The bride receives a similar compliment, and is presented with a pair of

wearing apparel and some ornaments. This ceremony is called *avata jaba*, from which day the visits of both the bride and the bridegroom to the homes of their future partners are optional and left to the convenience of the parties. Also on every holiday falling after the betrothal, an exchange of presents takes place, the bride's party generally being the gainer. This continues *till the time of marriage and after, until the due celebration* of *agharni* (pregnancy seven months advanced), which is the *finale* of a tragico-comical drama, after which the parties settle down soberly to the different vocations of life.

The veswal ceremony, though apparently complete by itself and detached from the marriage ceremony by a long period of time, has no place in sixteen *sanskars* as said before, and is consequently, for the sake of convenience, grouped together with marriage ceremonies. It creates only a revocable tie. If the rite of revocation is never exercised, it merges into marriage, which is irrevocable and which creates legal status and rights and duties against each other. The grounds of revocation are many and only exercised by the bride's father among the Nagars, and by the bridegroom's party among the Kupoles and others; these range from the death, discovery of a hidden blemish (which is a bar to marriage), excommunication, etc., of the bridegroom, to the improvement of chances of a better match. "If the bridegroom better than the previous one is available, even the given (maiden) may be taken away."* The dependent position of the bridegroom among the Nagar Brahmins is well illustrated by the Gujerat proverb current among them: "The *var* might have to return even from the *torana*." The *torana* is an archway of flower

* Mandlik's Translation of Yajnavalkya, p. 169.

garlands formed over the gateway or door of houses on festive occasions. In practice, however, this right of revocation is never exercised except for very substantial reasons and should never be wanton. "Once is a maiden given; he who takes her after giving is liable to be punished like a thief." *

But when one party not satisfied with the reasons of the other for backing out of the betrothal contract takes recourse to a court of law, it is then essential to know what are the most important points to which the attention of the court should be drawn so as to enable it to fix a reasonable sum for compensation to be given by one party to the other. Now it is an undisputed fact that the right of fixing the marriage day and place belongs to the bride's party. If therefore the arrangements break through on account of the bridegroom not falling in with the wishes of the opposite party, the fault lies with him and no compensation ought to be awarded in such cases. Any other wanton reason, as it would naturally cause annoyance, trouble, and expense to the other *party, would and ought to carry some compensation, but its amount would be better ascertained by waiting* till the marriage of one or both of the parties takes place, and the *palla* money in castes where the custom prevails would be the proper standard for measuring damages.

It is also a step taken in the right direction by the courts in refusing specific performance of the contract of marriage and is but the faithful echo of the sentiments of the castes on the question. The caste has hitherto never seen the necessity of out-casting any party for refusing to carry out its contract of marriage, especially where the court has awarded compensation or given any

* Manu IX., § 99.

judicial pronouncement. If the above principles were carried out to their logical sequence, the court cannot but uphold contract-marriage which would effectually wrest from the caste its jurisdiction, if any. Perhaps it would not be so unreasonable to allow the caste to supervise and control such ties when both parties belong to the same caste; but in cases where the male and the female belong each to a different caste, it should have no right of questioning the merits and the legality of the status on the analogy of *gandharva* marriage which I have treated at greater length in my previous papers on Marriage and Inheritance.

Next, let us turn to the legal aspect of the question as affecting the offspring of such marriages. In order to arrive at a workable hypothesis, it will be necessary to anticipate some of the principles enunciated by me in my previous papers on "*Aurasa Putra*" and "*Castes.*" Assuming, then, that a Hindu father is the absolute owner of all the property in his possession till by some overt act, as sacred-thread ceremony or marriage of his son, he establishes a communion between his ancestors *and his son through himself as the connecting link, and* thus admits him to a participation in the property, the son has no right therein, much less a right by birth. But the son who is entitled to this affiliation is generally the offspring of a *sanskara* marriage or marriage by sacrament; that, however, is not enough—the event which determines its character is the open acknowledgment by the father of his son as such. If, then, supposing a man who has no male children by his first marriage were to enter into *pat* marriage, those of the male children of the second marriage affiliated by him to the higher status by one of the acts mentioned above or by a simple declaration in his will, ought to acquire such

status. In case of the man having male children both by his first or *sanskara* marriage, and by the *pat* or second marriage, the latter should be held entitled to the self-acquired property jointly with all others, and the former to the ancestral property of their father. If, however, he has no male offspring by the *sanskara* marriage, and has some by the *pat* marriage, and he dies a member of a joint family before performing any of the affiliable acts or without making a will, the *pat* male offspring or offsprings can reach no higher than the male issue of the sacramental marriage; *i.e.*, they (the *pat* issue or issues) are only entitled to the self-acquired property of the man, and the ancestral will go to the nearest kinsman capable of offering a *pinda* to the deceased. If he is not a member of a joint family, his children of the *pat* marriage succeed to the whole property.

These are the simple principles submitted for the regeneration of the Hindu community in the matter of widow marriage and inheritance. It offers a very simple solution of a rather intricate question without offending against the cherished notions of several centuries, and has the advantage of reducing to a uniform system the different forms and ceremonies prevailing in different castes. It does away with the most offensive part of the ceremony of the present day widow marriage, as conducted by our reformers, *viz.*, the *saptapadi* ceremony, which has the effect of changing the *gotra* of the woman, at the same time that it compels the widow to wantonly break the former marriage vow which united her to her deceased husband for seven generations; it also gives her a certain status, though, of course, not equal to that of the first marriage. That the principles would readily

recommend themselves to the better sense of the majority of the Hindu community is what I infer from my discussion of these principles with several gentlemen of my and other castes. At any rate, an investigation conducted by a committee of influential gentlemen composed of leading men of each different caste and a few reformers at the instance and on the initiation of the High Court, on the lines of Mr. Borradaile's inquiries into social and other customs of different castes, would be a test on a larger scale of the principles enunciated here, and would certainly be productive of considerable beneficial results. In the end I can only wish that that day may not be far off when some such movement be set afoot and finally work out the salvation of my countrymen in this and other matters.



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